No. 80-981

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

DONALD HAMMOND,

*Petitioner,*

*v.*

THE PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FOURTH JUDICIAL DISTRICT

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction to review petitioner's *Brady* claim based upon evidence *dehors* the record and, if so, whether that jurisdiction ought to be exercised where the appellate court properly determined this issue in light of *Agurs*.

II. Whether the jury was fully informed of the elements of conspiracy and found petitioner guilty based upon allegations of which he had sufficient notice.

III. Whether petitioner presents a substantial question with respect to his guilt of conspiracy.

# INDEX

PAGE

JURISDICTION ..... 1
STATUTES INVOLVED ..... 2
STATEMENT OF THE CASE ..... 4
REASONS FOR DENIAL OF THE WRIT ..... 7

I.

IT WOULD BE BOTH IMPROVIDENT AND UNNECESSARY FOR THIS COURT TO REVIEW PETITIONER'S *BRADY* CLAIM ..... 7

A.

This Court Is An Improper Forum In Which To Present Claims Based Upon Evidence *Dehors* The Record ..... 7

B.

The Appellate Court, In Light Of *Agurs,* Correctly Denied Petitioner's *Brady* Claim Where No Request Was Made For The Suppressed Information And Where The Information Did Not Raise A Reasonable Doubt Of Petitioner's Guilt ..... 10

II.

THE JURY WAS FULLY INFORMED OF THE ELEMENTS OF CONSPIRACY AND FOUND PETITIONER GUILTY BASED UPON ALLEGATIONS OF WHICH HE HAD SUFFICIENT NOTICE ..... 12

PAGE

III.

PETITIONER PRESENTS NO SUBSTANTIAL QUESTION WITH RESPECT TO HIS GUILT OF CONSPIRACY ..... 14

CONCLUSION ..... 16

## TABLE OF CASES

*Cases.*


| | PAGE |
|---|---|
| *Brady* v. *Maryland*, 373 U. S. 83 (1963) | 9, 10 |
| *Brown* v. *United States*, 556 F. 2d 224 (3rd Cir. 1977) | 9 |
| *Fleming* v. *Gulf Oil Corp.*, 547 F. 2d 908 (10th Cir. 1977) | 8 |
| *Garrison* v. *Maggio*, 540 F. 2d 1271 (5th Cir. 1976) | 11 |
| *Giglio* v. *United States*, 405 U. S. 150 (1972) | 10 |
| *Jackson* v. *Florida*, 443 U. S. 307 (1979) | 14 |
| *Monroe* v. *Blackburn*, 607 F. 2d 148 (5th Cir. 1979) | 11 |
| *People* v. *Carroll*, 49 Ill. App. 3d 387, 364 N. E. 2d 408 (1st Dist. 1977) | 8 |
| *People* v. *Jones*, 60 Ill. 2d 300, 325 N. E. 2d 601 (1975) | 13 |
| *People* v. *Jones*, 75 Ill. App. 3d 214, 393 N. E. 2d 1132 (5th Dist. 1979) | 13 |
| *People* v. *Sheridan*, 51 Ill. App. 3d 963, 367 N. E. 2d 422 (4th Dist. 1977), *cert. denied*, 435 U. S. 975 (1978) | 8, 9 |
| *People* v. *Smith*, 71 Ill. 2d 95, 374 N. E. 2d 472 (1978) | 12 |
| *Reilly Tar & Chemical Corp.* v. *Lewis*, 301 Ill. App. 459, 23 N. E. 2d 243 (1st Dist. 1939) | 8 |
| *Stembridge* v. *Georgia*, 343 U. S. 541 (1952) | 9 |
| *United States* v. *Agurs*, 427 U. S. 97 (1976) | 7, 10, 11 |
| *United States* v. *Alvarez*, 610 F. 2d 1250 (5th Cir. 1980) | 15 |
| *United States* v. *Ford*, 324 F. 2d 950 (7th Cir. 1963) | 15 |
| *United States* v. *Gray*, 611 F. 2d 194 (7th Cir. 1979), *cert. denied*, ____ U. S. ____, 100 S. Ct. 1840 (1980) | 8 |

PAGE

*United States* v. *Mancillas*, 580 F. 2d 1301 (7th Cir. 1978) ..... 15
*United States* v. *Shelton*, 588 F. 2d 1242 (9th Cir. 1978) ..... 10
*United States* v. *Skillman*, 442 F. 2d 542 (8th Cir. 1971) ..... 15
*United States* v. *Walker*, 601 F. 2d 1051 (9th Cir. 1979) ..... 8
*Wagster* v. *Overberg*, 560 F. 2d 735 (6th Cir. 1977) ..... 9

*Table of Statutes.*

Ill. Rev. Stat. 1979, ch. 110A, § 321 ..... 8
Ill. Rev. Stat. 1979, ch. 110A, § 329 ..... 7, 9
Ill. Rev. Stat. 1979, ch. 110A, § 366(b)(2) ..... 12
28 U.S.C. § 1257(3) ..... 2

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### JURISDICTION

The jurisdictional requisites with respect to petitioner's claims that the jury was improperly instructed and that he was not proven guilty beyond a reasonable doubt are adequately set forth in the petition. However, as treated more fully in the

argument contained herein, respondent does not believe that petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant his petition in order that these issues may be reviewed.

Petitioner's additional claim of a *Brady* violation is not cognizable by this Court pursuant to 28 U.S.C. § 1257(3). The existence of an adequate state ground supporting denial of relief on this issue is discussed in Argument I.A. below.

## STATUTES INVOLVED

**Illinois Revised Statutes 1979, Chapter 110A, § 321.**

**§ 321. (Supreme Court Rule 321). Contents of Record on Appeal**

The record on appeal shall consist of the judgment appealed from, the notice of appeal, and other parts of the trial court record designated in the praecipes. The trial court record includes any report of proceedings and every other document filed and judgment and order entered in the cause. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court. No assignment of errors or cross-errors is necessary.

**Illinois Revised Statutes 1979, Chapter 110A, § 329.**

**§ 329. (Supreme Court Rule 329). Amendment of Record on Appeal**

The record on appeal shall be taken as true and correct unless shown to be otherwise and corrected in a manner permitted by this rule. Material omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before or after the record is transmitted to the reviewing court, or by the reviewing court. Any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled

by that court and the record made to conform to the truth. If the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant. If necessary, a supplemental record may be certified and transmitted.

**Illinois Revised Statutes 1979, Chapter 110A, § 366.**

**§ 366. (Supreme Court Rule 366). Powers of Reviewing Court; Scope of Review and Procedure; Lien of Judgment**

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(b) Scope of Review

(1) *General.*

(i) *Error of Law.* Any error of law affecting the judgment or order appealed from may be brought up for review.

(ii) *Error of Fact.* Any error of fact, in that the judgment or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review.

(2) *Scope and Procedure on Review in Jury Cases.* In jury cases the following rules govern:

(i) *Instructions.* No party may raise on appeal the failure to give an instruction unless he shall have tendered it.

* * * * * * * * *

## STATEMENT OF THE CASE

Respondent deems it necessary to clarify the *relevant* portions of petitioner's Statement of the Case as follows:

State's witness Dorothy Roscetti met the co-defendant Lavada Woolums in February of 1976 when she was 16 years of age. (R. Vol. XIII, 8, 9.) At that time the witness was living away from her parents in violation of a court probation order. Woolums told Roscetti that she would have to go to work or he would report the violation of her probation to the police. (R. Vol. XIII, 10.) Woolums had originally planned for Roscetti to work as a prostitute in Springfield. (R. Vol. XIII, 40.) However, these plans went awry and Woolums told the witness that he had worked out something else for her. (R. Vol. XIII, 46.) Consequently, Roscetti left Springfield with the co-defendant and his brother, traveling to different locations, until the co-defendant's sister-in-law Kathy picked her up in Rockport and transported her to Quincy. (R. Vol. XIII, 11, 12.) This occurred in early March. (R. Vol. XIII, 47.)

Once in Quincy, Roscetti went to the Poodle Lounge in the New Virginia Hotel where she met petitioner, his wife, and other girls and employees. (R. Vol. XIII, 12, 13.) Although Roscetti met petitioner on her first day in Quincy, their initial conversation did not occur until two days later. During this interval, she practiced prostitution. (R. Vol. XIII, 14, 42, 43.)

In their first conversation, petitioner indicated that Woolums had called him and that he had made arrangements with Woolums for the witness to work as a prostitute at the hotel. Petitioner said that he would take the money every night and put it in the safe and that Woolums or another individual would pick it up. (R. Vol. XIII, 14, 15.) Petitioner also instructed Roscetti to give five dollars to the desk clerk when signing in for a room, to write down any name and address when registering for the room, and to give five dollars to the bartender on returning to the lounge. (R. Vol. XIII, 17, 18.) Although

petitioner did not fix any definite prices to be charged of her customers, Roscetti was not supposed to make the price too low. She was instructed to have at least $10 or $20 left after paying the bartender and the room clerk. (R. Vol. XIII, 19, 20.)

Roscetti practiced prostitution as she had been instructed during the next three weeks. (R. Vol. XIII, 18, 19, 21, 22.) The sex acts occurred in two specific rooms in the New Virginia Hotel. (R. Vol. XIII, 23.) During this period, Roscetti was supposed to be directly answerable to Woolums. (R. Vol. XIII, 49.)

Approximately 10 days after arriving in Quincy, the witness spent one night in a motel in West Quincy, which was the first time she had not spent the night in the New Virginia Hotel. One of the persons whom she had previously seen at the hotel picked her up and returned her to Quincy. Upon returning to the hotel, Roscetti spoke to petitioner in the lobby. Petitioner said that he would let Woolums handle the situation involving her departure. A friend of co-defendant Woolums battered the witness and told her not to leave anymore. (R. Vol. XIII, 23-25.)

Roscetti continued her prostitution activities at the hotel but left a second time about one week later. Upon returning, petitioner said that he would call Woolums because she had "messed up again." (R. Vol. XIII, 26.) Although she did not see Woolums again, his brother came to the hotel to pick up the money. (R. Vol. XIII, 26, 27.)

The State also introduced the testimony of Charles Baley, a special agent of the Illinois Bureau of Investigations, who testified to events occurring on May 26, 1976.[1] He and a partner

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[1] Although one of the questions asked of Charles Baley referred him to May 26, 1978, perusal of other questions during both the People's and the defendant's examinations makes it clear that the date in issue is actually May 26, 1976. The later date appears to be either a misstatement or a typographical error. (See R. Vol. XIII, 53, 59, 64-70, 73, 74, 76-78.)

gave a male informant $25 and sent the informant into the New Virginia Hotel. Upon returning, the informant purported to have had intercourse there with a prostitute. The agents then went to the hotel to find the prostitute. (R. Vol. XIII, 54, 55.) There they met petitioner who obtained room keys for the officers and produced the guest register cards (R. Vol. XIII, 56, 57.) The prostitute had apparently left the hotel and petitioner stated that she "would not return". (R. Vol. XIII, 57, 58.) When Baley pointed out to petitioner the informant who claimed to have visited the prostitute, petitioner told Baley that if "his girl" were to be arrested, the informant should also be arrested. Baley testified that when he asked petitioner what "his girl" meant, the conversation ended abruptly. (R. Vol. XIII, 58.)

Subsequent to petitioner's conviction, he sought review in the Appellate Court of Illinois, Fourth Judicial District. The court rejected petitioner's complaint that Illinois Pattern Jury Instruction (Criminal) No. 6.03 was not submitted to the jury because the defense itself had objected to the instruction. The court further found IPI (Criminal) Instructions 6.04 and 3.17 to have been properly given. *People* v. *Hammond,* 82 Ill. App. 3d 839, 845, 403 N. E. 2d 305, 310 (4th Dist. 1980). In one paragraph of its decision, the court discussed the effect of an immunity granted State's witness Roscetti. 82 Ill. App. 3d at 844, 403 N. E. 2d at 309. However, the only evidence of any immunity grant was found in a deposition of State's Attorney Bier taken after notice of appeal had been filed and which, on April 11, 1980, the court declined to include in the appellate record.

Leave to appeal to the Illinois Supreme Court was denied without opinion on September 29, 1980.

## REASONS FOR DENIAL OF THE WRIT

### I.

### IT WOULD BE BOTH IMPROVIDENT AND UNNECESSARY FOR THIS COURT TO REVIEW PETITIONER'S *BRADY* CLAIM.

Petitioner's initial assignment of error is that the prosecution failed to disclose, pursuant to discovery, an immunity offer made to its chief witness. However, that witness Roscetti may have been granted immunity for her testimony is not of record in this case. Moreover, as petitioner made no request for the information, the appellate court properly denied relief based upon this Court's decision in *United States* v. *Agurs,* 427 U.S. 97 (1976).

### A.

### This Court Is An Improper Forum In Which To Present Claims Based Upon Evidence *Dehors* The Record.

Subsequent to petitioner's trial, a deposition of State's Attorney Robert Bier was taken in conjunction with a civil action that had been filed by petitioner in federal court, *Hammond* v. *City of Quincy, et. al.,* No. 78-3021 (S.D. Ill.). In that deposition Mr. Bier rather ambiguously indicated, in response to leading questions, that he had offered Roscetti immunity from prosecution in 1976 when the subsequently reinstated charges against petitioner were first filed. In light of the deposition, petitioner moved pursuant to Rule 329, Ill. Rev. Stat. 1979, ch. 110A, § 329, to supplement the record before the Appellate Court of Illinois, Fourth Judicial District, in which his direct appeal from conviction was pending. The State opposed the motion, which was denied by the court on April 11, 1980.

Petitioner now seeks to have this Court review his conviction based upon evidence *dehors* the record. Clearly, such a request must be rejected.

It is well-settled in Illinois that enlargement of the record on appeal is limited to only those documents, depositions and material that were before the trial court. *People* v. *Carroll,* 49 Ill. App. 3d 387, 364 N. E. 2d 408 (1st Dist. 1977); *People* v. *Sheridan,* 51 Ill. App. 3d 963, 367 N. E. 2d 422 (4th Dist. 1977) *cert. denied,* 435 U.S. 975 (1978); *Reilly Tar & Chemical Corp.* v. *Lewis,* 301 Ill. App. 459, 23 N. E. 2d 243 (1st Dist. 1939). *See* Ill. Rev. Stat. 1979, ch. 110A, § 321. This rule maintains in the federal courts as well. *See United States* v. *Walker,* 601 F. 2d 1051 (9th Cir. 1979) and *United States* v. *Gray,* 611 F. 2d 194 (7th Cir. 1979), *cert. denied,* ____ U.S. ____, 100 S. Ct. 1840 (1980). Because a responding party cannot be expected to create new and supplemental evidence to meet arguments, and because appellate courts are not empowered to hear evidence *de novo,* a deposition taken subsequent to the filing of a notice of appeal cannot be considered by the appellate court. *Fleming* v. *Gulf Oil Corp.,* 547 F. 2d 908 (10th Cir. 1977).

In the present case, for example, whether immunity was in fact granted witness Roscetti cannot be determined solely from the deposition.[2] Moreover, even if it were conclusively established, numerous factual determinations potentially relevant to disposition of his case on appeal, such as whether the immunization had any effect whatsoever on Roscetti's motivation for testifying,[3] or whether petitioner was fully cognizant of arrange-

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[2] It seems clear that the State had no intention of prosecuting the 16-year-old Roscetti, regardless of whether she testified. Charges were not leveled against her even after she forced the State to request dismissal of petitioner's case in 1976 by leaving Illinois for unknown parts.

[3] Roscetti initially cooperated with the police due to her fear of Woolums who she had heard was trying to locate her. (R. Vol. XIII, 28.)

ments that had been made with Roscetti,[4] could only be satisfactorily made with reference to evidence *dehors* the record.

Thus, the appellate court was obliged to refuse petitioner's request to supplement the record with State's Attorney Bier's deposition. Even if it did not,[5] however, the issue raised based upon the deposition is not properly before this Court. The Illinois Supreme Court declined to hear petitioner's argument of a *Brady* violation on September 29, 1980. Refusal to pass upon the question may well have been because the sole evidence raising the issue was not properly part of the record pursuant to Rule 329, Ill. Rev. Stat. 1979, ch. 110A, § 329, and because petitioner has an adequate post-conviction remedy. *See People* v. *Sheridan,* 51 Ill. App. 3d 963, 367 N. E. 2d 422 (4th Dist. 1977), *cert denied,* 435 U.S. 975 (1978). As this Court stated in *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952):

> Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.

Particularly where resolution of the constitutional claim might depend upon facts *dehors* the record which the State never had an opportunity to present to the trial court, this Court's jurisdiction is improvidently invoked.

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[4] There can be no violation of *Brady* v. *Maryland,* 373 U. S. 83 (1963), where the prosecution fails to disclose information already known to the defense. *Brown* v. *United States,* 556 F. 2d 224 (3rd Cir. 1977). Further, *Brady* did not relieve defense counsel from exercising some diligence in obtaining desired discovery. *Wagster* v. *Overberg,* 560 F. 2d 735, 739 (6th Cir. 1977). The defense here knew that Roscetti had been in the services of and cooperating with police for 2½ years. (R. Vol. XII, 7.) It was also aware, through discovery, that no charges had been filed against her by the State's Attorney because she was testifying. (R. Vol. XIII, 19.)

[5] Although the appellate court issued an order unequivocally denying petitioner's motion to supplement, it nevertheless discussed the immunity issue in one paragraph of its decision.

**B.**

**The Appellate Court, In Light Of *Agurs*, Correctly Denied Petitioner's *Brady* Claim Where No Request Was Made For The Suppressed Information And Where The Information Did Not Raise A Reasonable Doubt Of Petitioner's Guilt.**

Even assuming this Court could conclusively accept (1) immunity to have been granted Roscetti (2) contingent upon her testimony at trial and (3) that petitioner was unaware of the arrangement, the failure of the State to disclose such information did not deprive petitioner of a fair trial.

In *United States* v. *Agurs,* 427 U.S. 97 (1976), this Court distinguished three situations in which prosecutorial nondisclosure of evidence may arise. The first, illustrated by *Giglio* v. *United States,* 405 U.S. 150 (1972), involves suppressed evidence demonstrating that the prosecution's case includes perjured testimony of which the prosecution should have known. In that event, the verdict must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The second situation, exemplified by *Brady,* results in reversal where specific information requested by the defense might have affected the outcome of the trial. Finally, where the defense either fails to request information or does so only generally, due process is violated only where the undisclosed evidence creates a reasonable doubt that did not otherwise exist.

In the present case, defendant made no specific request for disclosure of the immunity grant. He did not request "material tending to impeach Roscetti", which the ninth circuit nevertheless found insufficient in *United States* v. *Shelton,* 588 F. 2d 1242, 1248 n. 10 (9th Cir. 1978), nor did he even make a general request for *Brady* material. Particularly here, where over two years had passed since Bier purportedly discussed immunity with Roscetti, a specific request was necessary to place the prosecution on notice of what exactly the defense desired.

Petitioner does not appear to quarrel with the appellate court's application of the *Agurs* test to the case at bar, but only that it incorrectly assessed the potential impact of the immunity grant on the outcome of his trial. In addition to the practical reasons that would support this Court's refusal to review the strength of the evidence in this case, it is apparent that the fact of an immunity granted Roscetti would not, in any event, create a reasonable doubt of guilt where none otherwise existed. First, the sole use the defense could make of this evidence would be to impeach Roscetti's general veracity. Indeed, in *Garrison* v. *Maggio,* 540 F. 2d 1271 (5th Cir. 1976), and *Monroe* v. *Blackburn,* 607 F. 2d 148, 152 (5th Cir. 1979), the fifth circuit held that purely impeaching evidence, going to the character of the witness rather than the substance of his statements, must be so crucial that its disclosure probably would have resulted in acquittal. Second, Roscetti's credibility was thoroughly attacked by evidence of prior inconsistent statements, her character for truthfulness, prior convictions, and general moral character. That she also may have been promised immunity for testifying at trial would add little, if anything, to the substantial impeachment already evaluated by the jury.[6]

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[6] It should be noted that the jury was instructed by Illinois Pattern Jury Instruction (Criminal) No. 3.17 which reads as follows:

> An accomplice witness is one who testifies that he was involved in the commission of a crime with the defendant. The testimony of an accomplice witness is subject to suspicion, and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.

## II.

## THE JURY WAS FULLY INFORMED OF THE ELEMENTS OF CONSPIRACY AND FOUND PETITIONER GUILTY BASED UPON ALLEGATIONS OF WHICH HE HAD SUFFICIENT NOTICE.

Petitioner contends that the jury was improperly instructed on the conspiracy charge because the instructions did not contain (1) a definition of conspiracy, (2) the identity of the co-conspirators, and (3) the date of the conspiracy. He has, however, no cause to complain of these purported errors which do not even approach being of constitutional dimension.

As the appellate court correctly ruled, petitioner has waived any claim of error in the court's failure to instruct the jury by People's Instruction No. 12 (I P I Criminal No. 6.03).[7] He not only objected to the instruction, but submitted no supplemental definitional instruction himself. *See People* v. *Smith,* 71 Ill. 2d 95, 374 N. E. 2d 472 (1978); Ill. Rev. Stat. 1977, ch. 110A, § 366(b)(2)(i). Moreover, petitioner failed to assign this as error in his post-trial motion.

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[7] *6.03 Conspiracy*

A person commits the crime of conspiracy who, with intent that the crime of be committed, agrees with [another] [others] to the commission of the crime of , and an act in furtherance of the agreement is performed by any party to the agreement.

An agreement may be implied from the conduct of the parties although they acted separately or by different means and did not come together or enter into an express agreement.

Each party to a conspiracy is responsible for all acts performed by his co-conspirators in furtherance of the conspiracy. [One who knowingly joins an existing conspiracy has the same responsibility as the original parties to the conspiracy.]

To constitute the crime of conspiracy it is not necessary that the conspirators succeed in committing the crime of .

Even if the objection were not waived, People's Instruction No. 20[8] (I P I Criminal No. 6.04, modified) was given, outlining the issues to be resolved on the conspiracy charge, and thus petitioner could not have been prejudiced by the absence of Instruction No. 12. *See People* v. *Jones,* 60 Ill. 2d 300, 325 N. E. 2d 601 (1975). In fact, review of Instruction No. 12, which gives an expansive definition of agreement and accountability for the actions of co-conspirators, indicates that, if anything, giving the instruction would have worked to petitioner's detriment.

Petitioner's second argument, rejected in *People* v. *Jones,* 75 Ill. App. 3d 214, 393 N. E. 2d 1132 (5th Dist. 1979), is equally without merit. Neither Illinois Pattern Jury Instruction (Criminal) No. 6.03 nor Instruction No. 6.04 requires that the co-conspirator's name be supplied in the instruction, and there existed no unique necessity for such to be done in the present case.

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[8] People's Instruction No. 20 reads as follows:

To sustain the charge of conspiracy, the State must prove the following propositions:

First: That the defendant agreed with another to the commission of the crime of keeping a place of prostitution; and

Second: That the defendant did so with intent that the crime of keeping a place of prostitution be committed, and

Third: That an act in furtherance of the agreement was performed by Donald Hammond in that Donald Hammond knowingly granted and permitted the use of the New Virginia Hotel for the purpose of prostitution by Tommie Roscetti.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Contrary to petitioner's suggestion (Petition, p. 51), the jury could not have believed persons involved in the events of May, 1976, to be co-conspirators. Roscetti's name was included in the issues instruction for conspiracy and she was not shown to be in any way implicated in the subsequent May transactions. Moreover, Lavada Woolums was specifically identified as the co-conspirator in closing argument. (R. Vol. XIV, 6-7, 9.)

For these same reasons the jury could not, by virtue of People's Instruction No. 18 (I P I Criminal No. 317),[9] have convicted petitioner of conspiracy from activities occurring on a date which he was not called upon to defend. Petitioner was on notice by the denial of his motion for a bill of particulars that the acts constituting the offense might have occurred on dates other than that of March 3, 1976, specified in the indictment. (R. Vol. III, 19, 20.) Apart from other crimes evidence, the events proved at trial spanned only several weeks. Through discovery and a statement of Roscetti's taken by defense counsel, the defense was amply prepared for cross-examination on relevant points. (See, for example, R. Vol. XIII, 46-48.)

## III.

## PETITIONER PRESENTS NO SUBSTANTIAL QUESTION WITH RESPECT TO HIS GUILT OF CONSPIRACY

Petitioner's due process attack on the sufficiency of the evidence must fail if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Florida,* 443 U.S. 307 (1979).

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[9] People's Instruction No. 18 reads as follows:

The indictment states that the crime charged was committed on or about March 3, 1976. If you find that the crime charged was committed, the State is not required to prove that it was committed on that particular date.

The facts of the present case establish compliance with this Court's pronouncement in *Jackson* and, in any event, do not warrant review by this Court.

Petitioner cites *United States* v. *Ford,* 324 F. 2d 950 (7th Cir. 1963) and *United States* v. *Alvarez,* 610 F. 2d 1250 (5th Cir. 1980), in support of the contention that there exists insufficient evidence to sustain his conviction for conspiring to keep a place of prostitution. The jury convicted Ford based solely on a single transient sales agreement. *See United States* v. *Mancillas,* 580 F. 2d 1301, 1307 (7th Cir. 1978); *United States* v. *Skillman,* 442 F. 2d 542 547 (8th Cir. 1971). The jury convicted Alvarez upon evidence of a mere promise to do an act which "might assist an embryonic conspiracy in achieving its yet unconsummated criminal end. . . ." *United States* v. *Alvarez, supra* at 1256.

The evidence of conspiracy in the present case clearly distinguishes it from *Ford* and *Alvarez.* Petitioner's relationship to the transaction was not found in one isolated event and his actual participation in the illegal conduct was not limited to mere promises of future aid to an only partially developed scheme.

In Roscetti's first conversation with petitioner, he indicated that Woolums had called him and that petitioner had *made arrangements* with Woolums for Roscetti to work as a prostitute at the hotel. This, in itself, established the conspiratorial agreement. Petitioner's explanation to Roscetti of operating procedures and, some two weeks later, his threat to inform Woolums of her departure from the hotel, establish both overt acts toward commission of the offense and an on-going participation in the conspiracy. From this and the other corroborating circumstantial evidence submitted at trial, a rational juror could conclude petitioner's guilt beyond a reasonable doubt.

## CONCLUSION

For the reasons heretofore stated, respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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